UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CUMBERLAND AND YORK DISTRIBUTORS,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Docket No. 01-244-P-H***
	)	
COORS BREWING COMPANY,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS OR STAY AND PLAINTIFF'S MOTION TO EXEMPT CLAIMS FROM ARBITRATION

Now before the court are the motions of defendant Coors Brewing Company to dismiss this action or, in the alternative, for a stay pending arbitration, Defendant's Motion to Dismiss or to Stay Pending Arbitration, etc. ("Defendant's Motion") (Docket No. 4), and of plaintiff Cumberland and York Distributors[1] for an order exempting its claims from arbitration and for summary judgment, Motion to Exempt Plaintiff's Claims from Arbitration and Motion for Summary Judgment, etc. ("Plaintiff's Motion") (Docket No. 7).[2]

In response to Defendant's Motion, the plaintiff acknowledged that "the Federal Arbitration Act would require the disputes between the parties to be resolved by arbitration." Response of

[1] The plaintiff has requested "a hearing and oral argument in open Court" on its motion. Docket No. 14. The motion raises no evidentiary issues necessitating a hearing; the request for a hearing is accordingly denied. Inasmuch as the parties' papers provide a sufficient basis on which the decide the motion, the request for oral argument is also denied.

[2] During a telephone conference held on December 28, 2001 the parties agreed that the defendant would initially respond to as much of the plaintiff's motion as raises the issue whether and to what extent the defendant is entitled to compel arbitration of any issue presented by this action. *See* margin note on letter dated December 21, 2001 from Nicholas Bull to William Brownell (Docket No. 9). The motion for summary judgment accordingly will not be considered in this recommended decision.

Cumberland and York Distributors to Motion of Defendant Coors Brewing Company to Compel Arbitration, etc. (Docket No. 5) at 2. About a month later, the plaintiff filed its pending motion nonetheless seeking an order exempting its claims from arbitration. The second amended complaint alleges violation of the Maine Malt Liquor and Wine Wholesalers Licensees Act, 28-A M.R.S.A. § 1401 *et seq.*, violation of 28-A M.R.S.A. § 707 and violations of state and federal antitrust laws. Second Amended Complaint (Docket No. 3) at 2-7.

The plaintiff is a wholesale licensee for distribution of the defendant's malt liquor beverage products in certain areas of southern Maine. *Id*. ¶ 7. The plaintiff and defendant are parties to a distributorship agreement that governs their business relationship. *Id*. ¶¶ 8, 24 & Exh. C. That agreement includes the following clauses, in pertinent part, concerning arbitration:

> 11.1 Except as set forth below, if any dispute between Distributor and Coors shall occur . . . such dispute shall be submitted by Distributor for informal mediation ("Mediation") of the dispute by the president of Coors (or his designee) within 60 days of the date the dispute shall first arise. Coors, but not Distributor, shall be bound by the decision of the president of Coors (or his designee) concerning the dispute. Mediation shall be a condition precedent to Distributor's right to pursue any other remedy available under this Agreement or otherwise available under law.
>
> 11.2 Any and all disputes between Distributor and Coors, . . . which disputes are not resolved by Mediation, shall be submitted to binding arbitration in the city nearest to Distributor in which there is a regional office of the American Arbitration Association, before a single arbitrator, in accordance with the Commercial Arbitration Rules and procedures of the American Arbitration Association. Any and all disputes shall be submitted to arbitration hereunder within one year from the date the dispute first arose or shall be forever barred. Arbitration hereunder shall be in lieu of all other remedies and procedures, provided that either party hereto may seek preliminary injunctive relief prior to the commencement of such Arbitration proceedings.

Coors Brewing Company Distributorship Agreement (effective January 1, 1997) ("Agreement") (Exh. C to Second Amended Complaint) at 17-18. If, as the plaintiff contends, its claims are exempt from arbitration despite the applicability of these paragraphs of the contract, the defendant's motion must be

denied in its entirety. I therefore will begin with consideration of the plaintiff's arguments for exemption.

The plaintiff contends that its claims are exempt from the contractual arbitration requirement "because the Defendant is attempting to force arbitration on an issue which has been determined by the State of Maine to be unenforceable and in violation of Maine law." Plaintiff's Motion at 1. The plaintiff relies on a letter dated December 7, 2001 from its lawyer to an assistant attorney general, a copy of which is attached to its now-withdrawn Motion to Exempt Count Count [sic] III of Plaintiff's Second Amended Complaint from Arbitration, etc. (Docket No. 6), and a letter dated December 13, 2001 from the chief of the Maine Bureau of Liquor Enforcement to its lawyer, a copy of which is attached to the plaintiff's Statement of Material Facts ("Cayford Letter") (Docket No. 8) as Exhibit I, to support its argument. The second letter states, in relevant part, that "any agreement[] that gives a Certificate of Approval Holder the right, or in this case, 'the exclusive right', to negotiate the sale of a wholesale business is in violation of Title 28-A M.R.S.A. Section 707(4)." Cayford Letter. The defendant holds a certificate of approval under 28-A M.R.S.A. § 1355. The plaintiff also cites *Solman Distrib., Inc. v. Brown-Forman Corp.*, 888 F.2d 170 (1st Cir. 1989), in support of its position.

In *Solman*, a certificate of approval holder sought to terminate an agreement with the plaintiff pursuant to which the plaintiff served as the exclusive distributor of the defendant's products in northern Maine. *Id*. at 171. The written agreement provided that either party could terminate the agreement at any time with or without cause by giving the other party thirty days' written notice, "except as otherwise provided by law." *Id*. Applicable Maine law provided that a certificate-of-approval holder could not terminate such an agreement without good cause. *Id*. at 171-72; 28-A M.R.S.A. § 1454. Maine law also provided that no certificate-of-approval holder could require a

wholesaler to waive compliance with any provisions of applicable Maine statutes. *Id*. at 172; 28-A M.R.S.A. § 1462. Holding that "in choosing to become a certificate holder, defendant had become bound by the [Maine] Act's requirements," the First Circuit upheld the district court's determination that the certificate-of-approval holder could not terminate the agreement without good cause. 888 F.2d at 172-73. However, contrary to the plaintiff's argument, the fact that the defendant is bound by the requirements of 28-A M.R.S.A. § 707[3] and that the state agency charged with administering that statute has found the provision of the contract at issue to violate that statute does not necessarily mean that the plaintiff may avoid arbitration on the issue.

Under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*,

> with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that the making of the agreement for arbitration or the failure to comply with the arbitration agreement is not in issue.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967) (citation and internal punctuation omitted). Here, the validity of the arbitration clause itself is not in issue. A party to an agreement that includes arbitration as the specified means of resolving disputes arising out of the agreement "cannot avoid arbitration by arguing, or even showing, that she should win on the merits of her theory that the underlying . . . agreements are illegal under state law." *Furgason v. McKenzie Check Advance of Indiana, Inc*., 2001 WL 238129 (S.D. Ind. Jan. 3, 2001) at *3. This result may appear harsh in circumstances, like those present here, where it appears that the clause of the agreement upon which the defendant relies violates applicable state law and the defendant's insistence on arbitration of the dispute under such circumstances merely serves to delay the outcome sought by the plaintiff. Nevertheless, when one of the parties to such an agreement has requested arbitration,

[3] The defendant is presumably also bound by the terms of 28-A M.R.S.A. § 1456, which prevents a certificate-of-approval holder (*continued on next page*)

under *Prima Paint*, the court may consider only issues related to the making and performance of the agreement to arbitrate, not the validity of the contract as a whole or of other specific terms of the contract. *Hydrick v. Management Recruiters Int'l, Inc.*, 738 F. Supp. 1434, 1435 (N.D. Ga. 1990). *See also Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). The "court cannot assume that an arbitrator will totally disregard the laws applicable to [the specific dispute between the parties] and deliberately order the [plaintiff] to violate such laws." *Hospital for Joint Diseases & Medical Ctr. v. Davis*, 442 F. Supp. 1030, 1033 (S.D. N.Y. 1977). So long as the applicable state law is brought to the arbitrator's attention by the plaintiff, it may return to this court for an order vacating any award by the arbitrator that would violate that law. *Id*.; *Gupta v. Cisco Sys., Inc.*, 274 F.3d 1, 3 (1st Cir. 2001). Again, this may provide cold comfort to the plaintiff under the circumstances of this case, but this court is bound to follow the directive of *Prima Paint* at this point in the proceedings. *See generally Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (where agreement stated that all disputes arising out of or in connection with contract would be settled by arbitration, question whether particular dispute is arbitrable must be presented to arbitrator).

The plaintiff relies on two federal district court opinions which, in *dicta*, appear to suggest a different result. In *Monument Mills, Inc. v. Textile Workers Union of Am.*, 152 F. Supp. 429, 430 (D. Mass. 1957), the court stated that language in *Local 205, United Elec., Radio & Mach. Workers of Am. v. General Elec. Co.*, 233 F.2d 85 (1st Cir. 1956), "indicates that a frivolous or patently baseless claim should not be ordered to arbitration." In *American Stores Co. v. Johnston*, 171 F. Supp. 275, 277 (S.D. N.Y. 1959), the court cited the same First Circuit decision in support of its statement that "[w]hen it appears that a claim of arbitrability is frivolous or patently baseless it would be an abuse

from unreasonably withholding consent to the transfer of a wholesale licensee's business.

of the arbitration process and would defeat the contractual intent of the parties to compel arbitration." In *Local 205*, as noted by the New York court and as is apparent from the context of the *Monument Mills* opinion, only an alleged claim of arbitrability itself was at issue. That fact decisively distinguishes the present case. Here, arbitrability is not at issue; the plaintiff attacks only the validity of the substantive clause of the agreement upon which the defendant seeks arbitration.

Accordingly, the plaintiff's motion for exemption from arbitration must be denied. That is not the end of the matter, however. The contract at issue also includes a term requiring mediation before the defendant's president as a condition precedent to arbitration, with no time limit for completion of such mediation. Even in the unlikely event that such a proceeding could possibly be considered mediation,[4] this court is not required by law to stay actions for purposes of mediation, nor will it do so. The court should grant the defendant's motion for a stay only on the condition that the defendant agree to proceed immediately to arbitration.[5]

The court should also deny the defendant's request that it dismiss this action in favor of arbitration rather than retaining jurisdiction and issuing a stay. While the defendant cites cases in which dismissal took place, *e.g., Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992), the courts clearly retain discretion on this point, *id*; *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). In the circumstances of this case, where for all that appears in the record the defendant is insisting upon arbitration when the position it will present to the arbitrator is contrary to applicable law, it is clearly advisable for this court to retain jurisdiction.

[4] Mediation is "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." *Black's Law Dictionary* (7th ed. 1999) at 996.

[5] If courts may not allow a party to ignore an agreement to arbitrate because "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate," *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984), surely a party may not be allowed to prolong resolution of a dispute by insisting on a term of the agreement that, reasonably construed, can only lead to further delay.

For the foregoing reasons, I recommend that the plaintiff's motion for exemption from arbitration be **DENIED**, that the defendant's motion for a stay pending prompt arbitration be **GRANTED**, and that the defendant's motion to dismiss be **DENIED**. If my recommendation is adopted, I further recommend that the court order the defendant to advise the court in writing within 7 days of the filing of the court's disposition whether it agrees to proceed directly and promptly to binding arbitration, bypassing the so-called "mediation" provided for in the distributorship agreement, and, assuming such agreement is forthcoming, thereafter on a monthly basis to render a written report on the status of the arbitration proceedings.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of February, 2002.

_____
David M. Cohen
United States Magistrate Judge

CUMBERLAND AND YORK DISTRIBUTORS
plaintiff

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v.

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